United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1040

To be argued by
ROBERT B. HEMLEY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 75-1040, 1046, 1047

UNITED STATES OF AMERICA,
Appellee,

—v.—

DANIEL JORDANO, ANDREW JORDAN and
ANTHONY MUFFUCCI,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

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UNITED STATES OF AMERICA,

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DANIEL JORDANO, ANDREW JORDAN and ANTHONY MUFFUCCI,

Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Daniel Jordano, Andrew Jordan a/k/a Andrew Jordano, and Anthony Muffucci appeal from judgments of convictions entered on January 28, 1975 in the United States District Court for the Southern District of New York, after a six day trial before the Honorable Robert L. Carter, United States District Judge, and a jury.

Indictment 74 Cr. 764, filed August 1, 1974, charged in Count One that Jordano, Jordan and Muffucci conspired with Charles Hodges, Ronald Corbia, and others to rob, steal and embezzle money from the Yonkers Savings Bank, 801 Yonkers Avenue, Yonkers, New York, in violation of Title 18, United States Code, Section 371. Counts Two, Three and Four charged Jordano, Jordan, Muffucci, Hodges and Corbia with the robbery, theft and embezzlement of money from the bank, in violation of Title 18, United States Code, Sections 2113(a), 2113(b), and 656, respectively.

Trial commenced on November 4, 1974 against Jordano, Jordan, Muffucci and Corbia.* On November 15, 1974, the jury found Corbia not guilty as charged in each count of the indictment and the other defendants not guilty as charged in Count Four. On November 16, 1974, the jury announced that it could not reach a verdict as to the charges against Jordano, Jordan and Muffucci contained in Counts One, Two and Three, and a mistrial was declared.

The retrial of Counts One, Two and Three as to Jordano, Jordan and Muffucci commenced before Judge Carter on December 9, 1974.** On December 14, 1974 the jury found each defendant guilty as charged in each count.

On January 28, 1975, Jordano, Jordan and Muffucci were sentenced to five years imprisonment.

Jordano, Jordan and Muffucci are presently at liberty on bail pending this appeal.

Statement of Facts

The Government's Case

On the morning of September 21, 1973, Charles Hodges and Kenneth Williams intercepted Ronald Corbia, a Yonkers Savings Bank messenger, on Yonkers Avenue in Yonkers,

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* Prior to trial, on October 15, 1974, Hodges pleaded guilty to Count Three of the indictment. On April 21, 1975 he was sentenced to a term of two years imprisonment, to run concurrently with an eight year sentence he received in New York State on an unrelated charge. Counts One, Two and Four were then dismissed as to Hodges.

** The indictment as presented to the jury on the retrial was redacted by agreement of counsel to eliminate any reference to the embezzlement charge or to Corbia as a defendant. The redacted indictment appears as part of the appendix to Muffucci's brief.

New York and robbed him of a bag containing $36,500 that he was transporting to his bank from the National Bank of North America (Tr. 44-45, 83-84).* Hodges made his getaway down an alley and over a fence while Williams was apprehended at the scene. (Tr. 84, 509).

Previously, in April or May, 1973, Anthony Muffucci had approached Charles Hodges and, without disclosing any details, asked him if he was interested in making some money with very little risk (Tr. 61). Hodges indicated he was interested, and a short time later had a second meeting with Muffucci, who was accompanied by Daniel Jordano, inside a dark blue 1973 Cadillac with a white top driven by Jordano. (Tr. 62).** At this meeting Muffucci and Jordano revealed that a second man would be needed to do the "job" they had in mind, and Hodges stated he would find someone he could trust (Tr. 62-63). Hodges then approached Kenneth Williams, who said he would be interested. (Tr. 64).

Several weeks passed before Hodges again saw Muffucci or Jordano. Towards the end of July or the beginning of August, 1973 they picked up Hodges in the dark blue Cadillac in front of his home in Mount Vernon, New York, and went looking for Williams.*** When they were unable

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* "Tr." refers to the trial transcript, "GX" to Government exhibits.

** At all times relevant to the indictment, Nationwide Liquidators, a merchandise warehouse owned and operated by Muffucci, Jordano, and Andrew Jordan, leased three 1973 Cadillacs with white tops from Mara U-Drive. (Tr. 480-485; GX 8-10). Originally, the cars were assigned to Jordan, Muffucci, and a Thomas Lavino, another Nationwide Official (Tr. 436). In August, 1973 the car which had been assigned to Lavino was reassigned to Jordano (Tr. 782).

*** Donald Hodges, the brother of Charles Hodges, met Muffucci and Jordano on several occasions in the summer of 1973 when they stopped by in the Cadillac to pick up his brother. (Tr. 417-419) He also noticed the blue Cadillac outside his house on September 20, 1973, the night before the robbery. (Tr. 419).

to locate Williams, they went to the Yonkers Diner where Hodges met Andrew Jordan for the first time. (Tr. 66). Jordan revealed the details of the "job" to Hodges, indicating that it involved intercepting a Yonkers Savings Bank messenger who regularly carried large sums of money along Yonkers Avenue en route to his bank from the National Bank of North America, one block away. The plan called for Hodges and Williams to steal the bag of money from the messenger and make their getaway down an alley and over a fence where they would be met by a waiting car (Tr. 67, 68; GX 1). After discussing the plan, Jordan, Muffucci and Jordano drove Hodges to the area of the bank and pointed out the getaway route (Tr. 69).

Hodges had no further contact with Muffucci, Jordano or Jordan until September 18, 1973, Tuesday of the week in which the robbery took place. On that day Muffucci called Hodges at home and told him to try to reach Williams.* A little past four in the afternoon, Muffucci, Jordano and Jordan arrived at Hodges' house in the dark blue Cadillac accompanied by a fourth unidentified man, who was riding a motorcycle. Together they proceeded to Fulton Avenue in Mount Vernon, where Williams was visiting his girlfriend, Christine Dial.** Williams came outside, and it was announced that the robbery would take place the next Friday, September 21, 1973. (Tr. 70-72). The six men, Hodges, Williams, Muffucci, Jordano, Jordan and the unidentified man on the motorcycle, then proceeded to the scene of the bank and reviewed the plans (Tr. 73).

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* While Hodges received the telephone call from Muffucci on this occasion, at other times he called Muffucci, whose unlisted telephone number he had in his possession (Tr. 85).

** On two occasions in the summer of 1973 one being two days prior to the Yonkers Savings Bank robbery, Miss Dial observed Hodges and Williams on Fulton Avenue in Mount Vernon in the company of white men who drove a blue Cadillac with a white top (Tr. 273-275).

In the evening of Thursday, September 20, the night before the robbery, Jordano, Jordan and the unidentified man picked up Hodges and Williams in Jordan's Cadillac. They went to an apartment in Yonkers where they spent the night (Tr. 76). The next morning Muffucci came to the apartment. Jordan gave Hodges and Williams work uniforms to wear over their clothes and drove them to the Yonkers Diner, down the street from the Yonkers Savings Bank (Tr. 78-79). The unidentified man, who according to the plan was to signal Hodges and Williams when to start toward the bank, met them at the diner (Tr. 79-81). Upon the signal, Hodges and Williams left the diner and took up their positions near the bank. The messenger arrived as predicted, accompanied by a lone guard. Williams attacked the guard and struggled with him. Hodges grabbed the satchel of money from the messenger, ran down the alley and jumped the fence. He then threw the satchel into Muffucci's Cadillac and himself got into another car which Jordano was driving. When Williams failed to appear, Jordano drove Hodges to the Bronx, and gave him $10. Hodges didn't see him again until the trial (Tr. 83-85).*

Sometime during the summer of 1973, Nancy Willis, who is Jordano's girlfriend, overheard a conversation between Jordano, Jordan, and three unidentified men in a bar in Yonkers in which reference was made to a bank messenger who carried sums of money (Tr. 299; GX 3537).

The Defense Case

Andrew Jordan testified that from March of 1972 through March of 1973, he, Jordano, and Muffucci had operated a

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* Williams was called as a witness for Jordan. He identified the defendants and testified that they had planned the bank robbery. His recollection of the times, places, and participants in various meetings differed somewhat from Hodges' (Tr. 492-510).

merchandise warehouse first known as The Liquidators and then as Nationwide Liquidators (Tr. 680-681, 694). During this period the company had two Westchester stores, one in Pelham Manor, the other in Elmsford (Tr. 683). It was at the Pelham Manor store that Jordan recalled seeing Hodges on three or four occasions at work as a delivery man for one of the trucking firms hired by customers of Nationwide (Tr. 685-686). Jordan testified that he, Jordano and Muffucci posted their unlisted telephone numbers in large black numerals behind the desk in the Pelham Manor store so that delivery men could reach them in an emergency, and it was argued that this explained why Hodges had Muffucci's unlisted telephone number (Tr. 692). Jordano, Jordan and Muffucci parked their blue Cadillacs in spaces in the Nationwide Liquidators parking lot on which their names were stenciled, and it was argued that this explained why Hodges and Williams could identify the cars they drove (Tr. 690).

Each of the three defendants presented an alibi for the night of September 20, 1973 and the morning of September 21.

Nancy Willis and Patricia Murphy testified on behalf of Daniel Jordano. According to their testimony Jordano spent the entire evening of September 20 in Mohegan Lake, New York with Willis. On the morning of September 21, between 10 and 10:30 a.m. Jordano received a telephone call in Mohegan Lake from Murphy, an employee of Willis, who called to say that Willis was late for an appointment. Thereafter, Jordano drove Willis to White Plains, arriving around noon (Tr. 320-322, 722-724).

In addition to his own testimony, Andrew Jordan's alibi was supported by the testimony of his co-workers John Bertrand, Thomas Barrett and Frank Kelly, and his wife, Karen Jordan. According to them, Andrew Jordan was at work on the evening of September 20 at the site of

the Second Avenue subway construction in Manhattan where he regularly worked a 4 p.m. to midnight shift as an engineer watching a wellpoint pump system (Tr. 655, 695-704; JX A).* Jordan relieved John Bertrand, who worked the 8 a.m.-4 p.m. shift (Tr. 630-632, 695), and was himself relieved by Thomas Barrett, who worked the midnight to 8 a.m. shift (Tr. 613-614, 695). After leaving work on September 20, Jordan went straight home (Tr. 705). He dined with his wife, and at approximately 12:45 a.m. called his friend Mike Contillo to arrange to pick up a radiator for his wife's car the next day from a junkyard run by Contillo's nephew (Tr. 659, 705). The next morning Jordan got up at 8:00 a.m. and went to the junkyard in his wife's 1971 Oldsmobile, leaving his Cadillac at home (Tr. 661, 709). He returned home around noon. (Tr. 66, 710).

According to the testimony of his wife Geraldine, and his friend, William Herald, Anthony Muffucci spent the night of September 20 with Herald in Albany, New York, whom he had gone to see to borrow money for his daughter's parochial school tuition (Tr. 786, 813). Muffucci arrived in Albany between 6:30 and 7:00 p.m., got drunk, and spent the night sleeping in his Cadillac locked inside Herald's gas station (Tr. 788). The next morning Herald woke Muffucci, gave him $1100 in cash, and saw him off between 9:30 and 10:00 a.m. (Tr. 790). Muffucci arrived home in Yonkers between 6:00 and 7:00 p.m. on September 21 (Tr. 814).

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* "JX" refers to Jordan's Exhibit.

ARGUMENT

POINT I

THE EXAMINATIONS OF WILLIS, HAHN AND FIELDING WERE PROPER.

Each of the three appellants alleges error in the Government's examination of Nancy Willis, Federal Bureau of Investigation Agent Hahn, and Yorktown, New York Detective Fielding, who were called as witnesses for the Government.* Muffucci claims solely that because the Government was not "surprised" when Willis recanted her grand jury testimony, it was error to admit the testimony into evidence and to allow Willis' subsequent impeachment through the testimony of Agent Hahn and Detective Fielding. Jordan adds to this the argument that, since, he claims, Willis' testimony did not affirmatively damage the Government's case, the testimony of Hahn and Fielding was not permissible impeachment. Jordano concedes that it was proper to admit Willis' grand jury testimony, but complains of Hahn's and Fielding's testimony.

The contentions of Muffucci and Jordan are entirely without merit. Relief must also be denied Jordano because of his adoption of Willis as his own witness prior to the testimony of Hahn and Fielding and because of Willis' assertion that her grand jury testimony was the result of coercion by the Government.

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* Willis and Fielding were adopted by Jordano as his own witness, as is discussed *infra* at pp. 12-15 (Tr. 319, 412, 449).

A. Willis' Grand Jury Testimony

On July 3, 1974, approximately five months prior to the trial below, Nancy Willis apeared before a grand jury sitting in the Southern District of New York. Willis testified that in July or August, 1973, while in a bar in Yonkers with Jordano, Jordan and Muffucci, she overheard a conversation between Jordano, Jordan and three other men whose names she didn't know in which "they were talking about knowing somebody—knew someone who was either friends with or knew somebody who was a bank messenger who carried some sums of money but no names were mentioned" (Tr. 297-299; GX 3537).*

At the trial below, however, as she had in the first trial, Willis testified that she did not overhear any conversation including Jordano and Jordan concerning a bank messenger or a bank or the transfer of funds (Tr. 296-297). Only Jordano objected when the Government attempted to refresh Willis' recollection by referring her to the grand jury transcript (Tr. 297), a procedure which Jordano now concedes was proper (Jordano Br. 16).** When Willis admitted that the transcript accurately reflected her prior testimony but claimed it was false, the transcript was offered and received in evidence.*** During his charge to the jury, Judge Carter, without objection, instructed the jury that the grand jury testimony could be considered as substantive evidence.

It is firmly established that prior inconsistent statements of a witness made under oath before the grand jury are admissible as affirmative evidence if the witness is avail-

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* Willis did not testify in the grand jury or at trial that Muffucci participated in or overheard the conversation.

** "Jordan Br." refers to the brief on appeal submitted by Daniel Jordano.

*** Upon the offer, only Muffucci, who was not incriminated by the grand jury testimony, objected, on the general ground that the testimony was "immaterial, irrelevant" (Tr. 298).

able for cross-examination. *United States* v. *Rivera*, Dkt. No. 74-2115 (2d Cir. March 13, 1975); *United States* v. *Klein*, 488 F.2d 481 (2d Cir. 1973); *United States* v. *Cunningham*, 446 F.2d 194, 197 (2d Cir.), *cert. denied*, 404 U.S. 950 (1971); *United States* v. *Mingoia*, 424 F.2d 710, 712-713 (2d Cir. 1970); *United States* v. *Insana*, 423 F.2d 1165 (2d Cir.), *cert. denied*, 400 U.S. 841 (1970); *United States* v. *DeSisto*, 329 F.2d 929 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964). In this case Willis' express denial of the truth of her prior sworn testimony permitted its admission as affirmative evidence, and the trial court's charge to that effect properly followed the rule in this Circuit. *United States* v. *Klein*, *supra*, 488 F.2d at 483; *United States* v. *Mingoia*, *supra*.

Jordan and Muffucci claim that the Government should not have been permitted to offer Willis' grand jury testimony. They argue that since she had denied its truthfulness at the first trial, the Government therefore was not "surprised" when she renounced it at the second trial. However, the hoary rule that a party may not impeach his own witness, IIIA Wigmore, *Evidence* §§ 896 *et seq.* (Chadbourn rev. 1970), has undergone substantial alteration, both by reason of Chief Judge Lumbard's landmark opinion in *United States* v. *Freeman*, 302 F.2d 347, 351 (2d Cir. 1962), *cert. denied*, 375 U.S. 958 (1963), and Rule 607 of the Federal Rules of Evidence. To the extent that a showing of "surprise" is still required under the law in this Circuit, such a showing need only be "modest", *United States* v. *Kahaner*, 317 F.2d 459, 474 (2d Cir.), *cert. denied*, 375 U.S. 835 (1963), and may be made out merely by a deviation from a prior unsworn statement by the witness on the subject matter of her testimony, even if the intended deviation is known to the Government before she takes the stand *United States* v. *Burket*, 480 F.2d 568, 571-572 (2d Cir. 1973). These are certainly the circumstances here. The contention that there was no surprise here because of Willis' abjuration of her grand jury testimony at the first trial is insufficient to overcome the principle applied in

Burket and, more recently, in *United States* v. *Rivera*, *supra*. In *Rivera*, Judge Friendly's exhaustive re-examination of *DeSisto* and its progeny in connection with the receipt in evidence at Rivera's second trial of the grand jury testimony of Hector Vigo, a recalcitrant Government witness, contained no hint that exclusion of that evidence would have been appropriate on the ground of Vigo's earlier repudiation of that grand jury testimony at Rivera's first trial, precisely the situation here. Indeed, given the appropriate use of grand jury testimony as affirmative evidence under *DeSisto* and the cases following it, the notion that the party calling the witness should be "surprised" before it may offer such direct evidence of guilt seems an entirely inappropriate limitation of the search for the truth in the trial process, *see United States* v. *Nixon*, 418 U.S. 683, 707-713 (1974), whatever the proper limitations may be in situations in which all prior statements available are only of a kind which may be used to attack credibility under stringent limiting instructions.

Moreover, except for Muffucci's objection to the offer of Willis' grand jury testimony on the grounds that it was "immaterial, irrelevant," neither he nor Jordan objected to its receipt into evidence. Accordingly, they are foreclosed from raising the issue on appeal. *United States* v. *Rivera*, *supra*, slip op. at 2272-2273; *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966). Finally, Muffucci's complaint is entirely misplaced since he is not even referred to in the challenged grand jury testimony.

B. The Testimony of Hahn and Fielding

After the admission into evidence of Willis' grand jury testimony, the Government asked her about other statements which Jordano had made to her concerning the bank robbery. When Willis said she could not recall any other statements, the Government attempted to refresh her recol-

lection by reminding her of statements she had reported to Agent Hahn and Detective Fielding. Willis remained firm in her failure to recall any statements made to her by Jordano, and denied having made any incriminating statements to Hahn or Fielding (Tr. 299-309). Thereafter, Jordano examined Willis, first as a Government witness and then as his own.* Upon Jordano's examination Willis testified that her testimony before the grand jury was the result of suggestions and threats made to her by agents of the FBI (Tr. 313-319). In a further effort to discredit the Government and protect her boyfriend Jordano, Willis also testified that Fielding had come to her house on a visit "of a personal nature" and had asked her out a number of times during the investigation (Tr. 390-391). On redirect examination Willis added an Assistant United States Attorney to the list of the Government agents who had threatened, intimidated, or frightened her prior to her testimony in the grand jury (Tr. 331-337). Willis was additionally Jordano's key alibi witness. After Jordano had explicitly made Willis his own witness (Tr. 319-320), she testified that from 5:30 p.m. on September 20, 1973, until 12:00 p.m. on September 21st, Jordano was with her on an overnight stay at Mohegan Lake, New York (Tr. 320-322).

Only after Willis had completed her testimony as both a Government and a defense witness did Agent Hahn and Detective Fielding testify. Hahn testified that on October 9, 1973, Willis voluntarily came to the FBI office in White Plains. During the course of an interview at the office, according to Hahn, Willis reported that "through conversation she had ascertained that Danny Jordano was responsible for setting up the robbery of the Yonkers Savings

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* Predictably, Jordan and Muffucci, who were not incriminated by Willis' trial testimony except to the extent it established they were relatives of Jordano, or by the subsequent testimony of Agent Hahn and Detective Fielding, chose not to examine Willis (Tr. 323, 388).

Bank" (Tr. 392-399). Hahn made no mention of Muffucci or Jordan. Indeed, on examination by Jordan, Agent Hahn stated that Willis never mentioned Andy Jordan as having been involved in the robbery (Tr. 402). Fielding testified that on September 18, 1973, three days before the robbery, Willis came to the Yorktown Police Department to make a complaint. During the course of an interview there, according to Fielding, Willis indicated "the possibility of a bank robbery taking place that Friday and her boyfriend, Daniel Jordano, being involved." (Tr. 410-411). Fielding, like Hahn, made no mention in his testimony of Muffucci or Jordan, and upon questioning by Jordan stated that Willis never mentioned Jordan in connection with any bank robbery (Tr. 415).

As Jordano concedes, when Willis failed to recall any statements made by Jordano in addition to those reflected in the grand jury testimony, it was proper for the Government to confront her with the statements she had allegedly made to Agent Hahn and Detective Fielding. *United States* v. *Cunningham*, *supra*, 446 F.2d at 197; *United States* v. *Mingoia*, *supra;* (Jordano Br. 24). Jordano's adoption of Willis as his own witness then made it permissible for the Government to impeach her and rebut her testimony as Jordano's witness through the testimony of Hahn and Fielding. See *United States* v. *Briggs*, 457 F.2d 908, 910-911 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972). Willis' assertion as Jordano's witness that she had been with him at the time another witness had testified Jordano was planning and executing the bank robbery allowed the Government to demonstrate that she had previously told law enforcement officials quite a different story.*

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* The so-called "orthodox rule" viewed with distaste by Professor Wigmore, III A *Wigmore, Evidence* § 913 at p. 704 (Chadbourn rev. 1970), suggests that at least in some jurisdictions the party who first calls a witness may not impeach him even after

[Footnote continued on following page]

Moreover, even apart from Jordano's adoption of Willis as his own witness, the testimony of Hahn and Fielding was proper to rebut Willis' assertion that she had only incriminated Jordano in the grand jury because she had been threatened and intimidated by Government agents. In this context, it was appropriate for the Goverment to demonstrate that shortly before and after the robbery Willis had given law enforcement officials accounts consistent with her grand jury testimony. As in *United States* v. *Rivera, supra,* slip op. at 2277-2278:

> "the Government could not be expected to remain silent in the face of a claim, vigorously developed by defense counsel in cross-examining [the witness] and presumably to be further exploited in summation, that it had procured false testimony by threats—a claim which, if credited by the jury, would have an effect far beyond the destruction of [the] grand jury testimony."

See also *United States* v. *Gerry,* Dkt. No. 74-2100 (2d Cir. March 28, 1975) slip op at 2598.

Allowing for the possibility that there was a proper foundation for the testimony of Hahn and Fielding, Jordano contends that the manner of impeachment was so prejudicial as to deprive him of a fair trial. To bolster this argument Jordano asserts that the impeachment of Willis constituted the most devastating evidence in the case and suggests that the jury may have evaluated it as affirmative evidence contrary to the repeated instructions of the Court. To guard against that possibility, the Trial Court instructed

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the witness is adopted by his adversary. This Circuit indicated its displeasure with what Wigmore describes as "a ridiculous structure in the air of legal fancy" in *United States* v. *Freeman, supra.* The "orthodox rule" has been finally interred by Rule 607 of the Federal Rules of Evidence. See discussion, p. 10, *supra.*

the jury as to the limited use of the impeaching evidence no less than four separate times (Tr. 301, 354, 395, 954). While Jordano, the only one of the appellants to do so, objected to the testimony on grounds of improper impeachment, he never expressed any dissatisfaction with the court's limiting instructions which he now claims it is "utterly impossible" to believe the jury understood (Jordano Br. 30). It is settled doctrine that juries are presumed usually to be able and willing to follow instructions. *Bruton* v. *United States*, 391 U.S. 123, 135 (1963); *Lutwak* v. *United States*, 344 U.S. 604, 619 (1953); *United States* v. *Kaplan*, 510 F.2d 606, 611 (2d Cir. 1974); *United States* v. *Quinn*, 445 F.2d 940, 945 (2d Cir.), *cert. denied*, 404 U.S. 850 (1971). Further, this was not a case such as *United States* v. *Kaplan*, *supra*, or *United States* v. *Torres*, 503 F.2d 1120, 1122 (2d Cir. 1974) where comments by the prosecutor in summation might be said to have undercut the protection afforded by the limiting instructions. To the contrary, all three defense summations and the Government's summation stressed that the main question for the jury to decide was whether they could believe the two accomplices, Hodges and Williams (Tr. 885, 922).* The Government carefully

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* Jordano argues in his brief that the impeachment of Willis was the most important aspect of the trial, and points to the fact that within a short time of retiring to deliberate the jury asked that Fielding's and Willis' testimony be reread in their entirety. While there is a strong policy against probing into the jury's logic or reasoning, *United States* v. *Zane*, 495 F.2d 683, 690 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3239 (October 22, 1974), the most reasonable explanation for that request was to enable the jury to consider Jordano's alibi in the context of Fielding's testimony that after Willis had visited him at the Yorktown Police station three days prior to the robbery and told him Jordano would be involved in a bank robbery the next Friday, he immediately went to interview Jordano (Tr. 410-411, 449). Significantly, the jury did not request Hahn's testimony, wherein he reported that Willis told him *after* the robbery that Jordano had been responsible for it. Further, as the deliberations progressed and the jury focused on the Government's case, they only asked for various portions of Hodges' testimony and the charge. (Tr. 999, 1001).

argued that the jury would have to decide if Nancy Willis was telling the truth in court or telling the truth in the grand jury (Tr. 933). As in *United States* v. *Briggs*, *supra*, while the Trial Court's instructions were clear enough, the judge would doubtless have made the point even clearer if he had been asked. And though, as in *United States* v. *Briggs*, *supra*, and *United States* v. *Rivera*, *supra*, it may be that the impeachment of Willis was prejudicial to Jordano, "[t]his is not the kind of 'prejudice' against which the law of evidence can or should protect." *United States* v. *Briggs*, *supra*, 457 F.2d at 911.

In any event, Muffucci and Jordan were in no way injured by the testimony of Agent Hahn and Detective Fielding. They were not mentioned in the testimony of what Willis had told the officers, and indeed Jordan elicited from both men that Willis had not in any way connected him to the robbery. Moreover, neither Jordan nor Muffucci made any specific objection to the challenged testimony.*

Finally, the Government's case was substantial quite apart from Willis' testimony. Two accomplices, Hodges and Williams, separately detailed the appellants' involvement in the planning and execution of the robbery. They were corroborated by their identification of the cars which the appellants drove, their possession of Muffucci's unlisted telephone number and the testimony of Donald Hodges and Christine Dial.

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* Muffucci did voice an objection during the examination of Willis to the deletion from what Willis had told Agent Hahn of an incriminating reference to what Jordano had told her about Muffucci's involvement (Tr. 308). Jordan made a single unspecified objection during the examination of Willis (Tr. 305).

POINT II

THE TRIAL COURT PROPERLY REFUSED TO ADMIT INTO EVIDENCE THE COPY OF THE JUNKYARD RECEIPT OFFERED BY ANDREW JORDAN.

Jordan's alibi for the morning of September 21, 1973 was that he went to a junkyard operated by a nephew of his friend Mike Contillo and obtained a replacement for the radiator in his wife's 1971 Oldsmobile (Tr. 656-658, 706-710). In addition to his own testimony and that of his wife, Jordan offered a copy of the receipt which he claimed to have received from the junkyard, explaining that he had lost the original after the copy was made in his attorney's office (Tr. 711, 717-718). Repeated offers of the copy were made and denied (Tr. 658, 718, 758).

The well established rule is that secondary evidence may be admitted in lieu of the original provided the original has not been lost, destroyed or become unavailable through the fault of the proponent and provided the copy does not otherwise appear to be untrustworthy. *United States* v. *Savage*, 482 F.2d 1371, 1372 (9th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974); *United States* v. *Maxwell*, 383 F.2d 437, 442 & n.3 (2d Cir. 1967), *cert. denied*, 389 U.S. 1043 (1968); *United States* v. *Knohl*, 379 F.2d 427, 441 (2d Cir. 1967); *McCormick, Evidence* § 196 (1954); IV *Wigmore, Evidence* § 1192 (Chadbourn rev. 1970). Moreover, great deference is accorded to the trial judge's determinations of admissibility. *United States* v. *Ross*, 321 F.2d 61, 70 (2d Cir.), *cert. denied*, 375 U.S. 894 (1963).

Here, of course, Jordan himself claims to have lost the junkyard receipt for his $25 cash purchase. At no time did he offer the testimony of Mike Contillo, the friend whom he claims he telephoned at 12:45 A.M. on September 21, 1973 to arrange for his trip to the junkyard, or of the unnamed junkyard dealer, or any of the junkyard's own records.

Instead, his claim of the receipt's authenticity rested solely on his own testimony and that of his wife, a questionable foundation when dealing with xeroxed material.

Even if the failure to admit the copy of the junkyard receipt were erroneous, Jordan would not be entitled to any relief. The facts of his alleged trip to the junkyard had been testified about fully, and the jury was made aware that he possessed what purported to be a copy of a receipt he obtained there.* See *United States* v. *Maxwell, supra* 383 F.2d at 443.

POINT III

THE REMAINDER OF MUFFUCCI'S CONTENTIONS ARE WITHOUT MERIT.

A. Government's Exhibit 1

Muffucci complains that he was deprived of a fair trial due to the admission into evidence of Government's Exhibit 1, a diagram of the scene of the crime.

After Yonkers Savings Bank manager Robert Troiano, who had worked in the area depicted in the diagram for two years, testified as to the diagram's accuracy, the diagram, Government's Exhibit 1, was offered and received into evidence (Tr. 37-41).** Thereafter various Government and

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* In his final argument Jordan commented on the subject: "He got a receipt for it and he paid for it" (Tr. 876). Jordano, whose remarks followed, said: "Everybody has seen the receipt even though it's not in evidence" (Tr. 910). Further, the jury apparently rejected Jordan's alibi that he was at work on the evening of September 20, 1973, even though it was supported by the construction site attendance records (JX A).

** While Troiano had never been down the alley depicted in the diagram and could not say whether there was a fence at the end, Charles Hodges, the next Government witness testified as to the accuracy of the diagram in that respect (Tr. 40, 68).

defense witnesses referred to the diagram as they testified about the area in which the bank robbery took place.

The use of the diagram as an illustration of the area surrounding the Yonkers Savings Bank was entirely proper. *Cohen* v. *Kindlon*, 366 F.2d 762, 764 (2d Cir. 1966); *United States* v. *D'Antonio*, 324 F.2d 667, 668 (3d Cir.), *cert. denied*, 376 U.S. 909 (1964); *Grayson* v. *Williams*, 256 F.2d 61, 62 (10th Cir. 1958); III *Wigmore, Evidence* §§ 790-791 (Chadbourn rev. 1970); *McCormick, Evidence* § 180 (1954). Inasmuch as the Government witnesses were familiar with the area and could testify as to the diagram's accuracy, it is of no consequence that it was not established who actually prepared it. *Cohen* v. *Kindlon, supra.* The admission of such demonstrative evidence is discretionary with the trial judge and is subject to review only upon a clear showing of abuse and resulting prejudice. *United States* v. *Ellenbogen*, 365 F.2d 982 (2d Cir. 1966), *cert. denied*, 386 U.S. 923 (1967).

B. Voir Dire of Prospective Jurors

Muffucci next asserts that the Trial Court's failure to inquire of the prospective jurors whether they felt a defendant has a duty to take the witness stand deprived him of a fair trial.

It is axiomatic that a trial judge has broad discretion in the conduct of the voir dire. e.g., *United States* v. *Tramunti*, Dkt. No. 74-1550 (2d Cir., March 7, 1975) slip op. at 2153-2154. *United States* v. *Grant*, 494 F.2d 120, 122 (2d Cir. 1974). Muffucci was adequately protected against the possibility of the jury drawing an adverse inference from his decision not to testify by the Court's final instructions to the jury (Tr. 979-980). *Bruno* v. *United States*, 308 U.S. 287 (1939); *United States* v. *Clarke*, 468 F.2d 890, 891 (5th Cir. 1972); *United States* v. *Sperling*, 362 F. Supp. 909, 913 (S.D.N.Y. 1973).

C. Rule 29 Motions

At the end of the Government and defense cases, Muffucci, as did the other appellants, made routine motions for judgments of acquittal on each count pursuant to Rule 29 of the Federal Rules of Criminal Procedure. These motions were denied by the Court in reliance on *United States* v. *Taylor*, 464 F.2d 240 (2d Cir. 1972). Muffucci now contends that the Court's rulings were in error.*

The record clearly establishes that Muffucci was instrumental in the planning and execution of the bank robbery. In addition to making initial contact with Hodges and proposing the idea of the robbery to him, Muffucci was present at every meeting where the details of the robbery were reviewed.** Indeed, it was Muffucci's unlisted telephone number that Hodges and Williams were given to call (Tr. 85, 553-554, 571). The jury was entitled to conclude that Muffucci was a member of the conspiracy as charged in Count One.

As charged in Count Two, the evidence demonstrated that force, violence, and intimidation were used in the robbery. Hodges and Williams intercepted the bank messenger and the accompanying guard. While Hodges grabbed the satchel containing the money, Williams attacked the guard (Tr. 45, 49, 84, 509). This proof was sufficient.

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* Muffucci apparently also contends that it was error for the Court not to strike from the indictment paragraphs two and three and certain overt acts charged in Count One. It is sufficient to note in response that Muffucci did not make any motion to strike at the trial below and that the redacted indictment submitted to the jury which appears in the appendix to Muffucci's brief was the result of an agreement between the Government and all the appellants, including Muffucci (Tr. 451-460, 835-836).

** According to Hodges, Muffucci did not arrive at the final meeting in the Yonkers apartment until the morning of September 21, 1973 (Tr. 78-79). According to Williams, Muffucci was also present the night before (Tr. 500).

United States v. *Fraker*, 294 F.2d 859 (9th Cir. 1961); *United States* v. *Jalaski*, 237 F.2d 503, 505-506 (7th Cir.), *cert. denied*, 353 U.S. 939 (1956); *White* v. *United States*, 85 F.2d 268 (D.C. Cir. 1936). The Jury was entitled to find Muffucci guilty as charged in Counts Two and Three under the aiding and abetting theory presented in the Court's final instructions. *Nye and Nissen* v. *United States*, 336 U.S. 613 (1949).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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